

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

ORIGINAL

77-1243
77-1285

United States Court of Appeals
FOR THE SECOND CIRCUIT

Docket No. 77-1243

Docket No. 77-1285

UNITED STATES OF AMERICA,

Appellee

—against—

WILLIAM H. HOCKRIDGE, CHARLES PETRI

AND STEPHEN K. EASTON,

Defendants-Appellants,

—and—

GEORGE FLYNN AND GEORGE WHITNEY,

Defendants.

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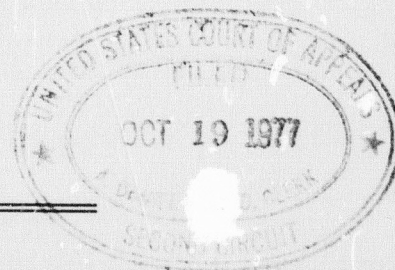


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ISSUES PRESENTED FOR REVIEW

I.

Did the Court's private interview with and instruction of two jurors during the deliberations constitute reversible error, where the jury as a whole never received similar instruction?

II.

Did the Court's private interview with two jurors, which included a modified Allen charge to them, during the deliberations, coerce the rendering of a verdict on Count Two of the indictment?

III.

Where two jurors indicated during deliberations, but after a partial verdict, that the verdict was not unanimous, and that they had been "incredibly attacked personally" by other jurors and had renounced their conscientious convictions of Easton's innocence, has competent evidence sufficient to impeach the partial verdict been adduced?

IV.

Where two jurors stated during deliberations that the partial verdict was not unanimous, the Judge directed them

to raise their questions anew with the jury and stated that he would question them again, did the Court err in failing to instruct the entire jury to deliberate anew and in failing to call for a verdict again and in failing to repoll the jury?

V.

Where the redacted indictment charged four defendants with twenty-three crimes, the trial endured over thirty days and sixty-nine witnesses were heard, was Easton's right to poll the jury denied when the jury was polled as to all defendants rather than as to each individual defendant?

VI.

Was prejudicial error committed in permitting numerous witnesses to testify as to Easton's commission of a wholly unrelated crime?

VII.

Was prejudicial error committed in permitting the introduction of irrelevant evidence that Easton's net worth had dramatically increased in 1974, two years after the crimes charged?

VIII.

Was prejudicial error committed in permitting the reception of financial statements central to the prosecution's

case without any authentication thereof and where the statements were inadmissible as hearsay?

STATEMENT OF THE CASE

A. Nature Of Case And Proceedings Below

In this proceeding, defendant-appellant Stephen K. Easton ("Easton"), a certified public accountant, together with co-defendants William H. Hockridge ("Hockridge"), Charles Petri ("Petri"), George Flynn ("Flynn"), George Whitney ("Whitney") and Charles Rapport ("Rapport")* were charged with twenty-four counts of misconduct occurring in 1971 and 1972 (A. 4).**

The first count charged conspiracy to violate 18 U.S.C. §§ 656, 1005 and 1014 (1970). The second count charged that Hockridge, as officer of the Chemical Bank, misapplied funds of that bank and that Petri, Flynn, Whitney and Easton

* Rapport was severed from the trial on the day prior to summations because his trial counsel suffered serious injury. Whitney entered a plea of guilty to Count One of the indictment prior to trial. Count Six of the Indictment was dismissed at the time of severance. As discussed below; Flynn was found not guilty upon thirteen counts of the indictment and the remaining counts were dismissed. Hockridge and Petri who were found guilty upon two and three counts respectively, have also appealed to this Court.

** References preceded with "A" are to Easton's Appendix.

aided and abetted such misconduct [18 U.S.C. §§ 656* and 2 (1970)]. Counts Three through Seventeen charged the defendant with making false financial statements with respect to various corporations for the purpose of influencing the Chemical Bank and Bank of New York to make certain loans [18 U.S.C. § 1014 (1970)].**

* 18 U.S.C. § 656 (1970) provides in pertinent part:

"Whoever, being an officer, director, agent or employee of, or connected in any capacity with any Federal Reserve bank member bank national bank or insured bank, or a receiver of a national bank, or any agent or employee of the receiver, or a Federal Reserve Agent or of the Board of Governors of the Federal Reserve System, embezzles, abstracts, purloins or willfully misapplies any of the moneys, funds or credits of such bank or any moneys, funds, assets or securities entrusted to the custody or care of such bank, or to the custody or care of any such agent, officer, director, employee or receiver, shall be fined not more than \$5,000 or imprisoned not more than five years, or both; but if the amount embezzled, abstracted, purloined or misapplied does not exceed \$100, he shall be fined not more than \$1,000 or imprisoned not more than one year, or both."

** 18 U.S.C. § 1014 (1970) provides in pertinent part:

"Whoever knowingly makes any false statement or report, or willfully overvalues any land, property or security, for the purpose of influencing in any way the action of . . . any bank the deposits of which are insured by the Federal Deposit Insurance Corporation . . . upon any application, advance . . . commitment or loan . . . shall be fined not more than \$5,000 or imprisoned not more than two years or both."

Counts Eighteen through Twenty-four charged that Hockridge, aided and abetted by the remaining defendants except Rapport, made false entries in the books of the Chemical Bank [18 U.S.C. § 1005 (1970)].*

All defendants but Whitney entered pleas of not guilty.

The trial of this complex multi-defendant matter before a jury with the Honorable Dudley B. Bonsal presiding commenced on December 2, 1976 and continued until 34 days thereafter when the jury was discharged, after rendering verdicts on thirteen counts. During the trial, 43 government witnesses were heard and 26 witnesses for the various defen-

* 18 U.S.C. § 1005 (1970) provides in pertinent part:

"Whoever makes any false entry in any book, report, or statement of such bank with intent to injure or defraud such bank, or any other company, body politic or corporate, or any individual person or to deceive any officer of such bank, or the Comptroller of the Currency, or the Federal Deposit Insurance Corporation, or any agent or examiner appointed to examine the affairs of such bank, or the Board of Governors of the Federal Reserve System --

"Shall be fined not more than \$5,000 or imprisoned not more than five years, or both."

dants. The jury found Hockridge and Easton guilty on Counts One and Two (hereinafter also the "conspiracy" and "misapplication" counts) and Petri guilty on Counts One, Two and Eight. Flynn was acquitted on all thirteen counts.

During the course of the jury deliberations, Easton moved for a mistrial, and thereafter renewed by motion to set aside the verdict (A. 2), by reason of certain misconduct occurring during the course of deliberations which was disclosed during a private interview held by the Court with Jurors Three and Four.

Easton was sentenced on June 15, 1977 to one to six months' imprisonment on Count One and a fine of \$5,000, and to supervised probation for three years on Count Two. Easton thereafter filed his Notice of Appeal to this Court.

B. Statement of Facts

1. Allegations Of
The Indictment

In Count One the indictment at bar charged a conspiracy in which (a) Hockridge, a Chemical Bank loan officer, misapplied funds of his employer, (b) the other defendants, who allegedly controlled certain corporations (Easton rendered accounting services as a part-time employee (T. 4598), filed inaccurate financial statements with the bank, through Hockridge, the loan officer for the corporations, in order to induce the granting of loans to those corporations, and (c)

Hockridge made false reports to Chemical as to meetings with alleged representatives of the borrowing corporations in order to justify the granting of loans (A. 4, et seq.). The indictment further alleged that the principal means of the conspiracy were (a) that defendants secured control of "bankrupt, insolvent and dormant corporations" and established new corporations, to which the loans would be granted (A. 7-12);* (b) that certain payments and other remuneration were given Hockridge, some part of which was derived from loan proceeds (A. 9-10); (c) that the corporations were made to appear as if under separate management, by the appointment of clerks, secretaries and the like as officers thereof (A. 10); (d) that Hockridge, knowing of this fact, violated certain internal banking rules in order to evade rules prohibiting loan officers from approving loans in excess of a certain sum to any one customer or commonly controlled customers (A. 11); and (e) that Hockridge masked his alleged violation of this internal rule by then making false entries in Chemical records pertaining to alleged interviews (A. 11).

The Second Count charged misapplication of such

* The eighteen corporations and the amounts of the alleged loans are set forth at A. 8-9. The corporations are hereinafter collectively referred to as the "borrowing corporations".

funds. The remaining counts charged the specific substantive offenses of filing false financial statements concerning the corporations and the making of false entries in Chemical's records.

In the indictment Petri is described as "an entrepreneur" who obtained certain of the loans through controlled corporate entities. Flynn is described as Petri's partner. Whitney is described as an associate of Petri's and Flynn's. Easton is described as a certified public accountant and the "chief financial officer" of the various corporations (A. 5-6).

2. Evidence Of
Jury Misconduct

Almost from the inception of the trial of this matter there was evidence of jury misconduct.

On the morning of the fifth day of the trial (December 10, 1976), the Court received a note from Juror #3 (T. 515-6).^{*} Ultimately the Judge determined to interview her in chambers. Juror #3, inter alia, revealed that the jury had been improperly discussing the case during recesses and that:

* References preceded by the designation "T." are to the transcript of the proceedings below.

"[T]he people in the jury are not giving these people [defendants] a fair chance . . . several of the people have expressed their opinion that these people are guilty." (T. 566)

After allowing counsel to hear the minutes of the interview, the Court dismissed the juror's comments stating:

"I don't think it is serious and I think this is the normal reaction of a young, perhaps little idealistic girl . . . "
(T. 570)

Defendants moved for a mistrial on the ground the jury was biased and the motion was denied (T. 570). The Court subsequently determined to interview the other jurors at the close of the day's testimony (T. 627). The interviews were brief, and the Judge prefaced his inquiry with a reminder to each juror of the juror's obligation not to discuss the case prior to the close of testimony, an admonition clearly tending to discourage any revelations of misconduct (T. 688-727).

During the interviews seven other jurors and two alternates indicated they had heard other jurors express opinions as to the defendants' guilt. Juror #4 stated that she had heard three jurors express such sentiment:

"They make statements like, oh they are guilty, let's get this over with."
(T. 696)

The motion for a mistrial was renewed (T. 730-1) and again denied (T. 736).

Substantial additional misconduct occurred during the course of the jury deliberations. On Friday, February 11, 1977 the Court charged the jury. The charge was concluded at approximately 12:05 p.m. that day (T. 5860) and the jury then released. At 4:45 p.m. the jury requested to hear the Court's charge with respect to the elements of a conspiracy again (T. 5864), which charge was repeated by the Court.* The jury concluded deliberations for the day at 9:30 p.m. (T. 5877). At the time, they had not reached any verdict (id.).

Deliberations were resumed Monday, February 14, 1977 (id.). During the day, the jury requested further exhibits (T. 5880) and asked to be read excerpts from Easton's testimony and from the testimony of one bank officer, John Otis, concerning conversations he had with Easton relating to one loan (T. 5882-3), which testimony was read. At 6:30 p.m. after the jury had worked all day they met with the Court and reported that they had reached a verdict as to three defendants

* Prior thereto, the jurors had requested that certain exhibits be transmitted to them (T. 5862, 5863), including evidence which had been admitted only subject to connection (e.g., T. 5863, 5880, 5901, 5908-9).

on Count One of the indictment. Over objection, the Court heard the partial verdict finding Hockridge, Petri and Easton guilty* (T. 5961-2). At defendants' request the jury was polled; however, each juror was not polled separately as to each of the three defendants (id.). In view of the subsequent occurrences, and attempts by the jurors to recant their verdict as to Easton, the failure to poll individually deprived the jurors of an opportunity to be heard on their "so-called" verdict.

The following day, the jury heard further excerpts from the testimony and received further exhibits (T. 5907-9). At 5:00 p.m. the Judge revealed for the first time that in the morning of that day he had received a note from Juror #4 requesting to see him; after discussion with counsel, the Judge determined not to interview the juror (A. 57-63). The jury was discharged for the day.

The next day, February 16, 1977, at 10:00 a.m. the Court revealed to counsel his receipt of a note from another Juror (# 3) (A. 65). The note read:

"Judge Bonsal, please see me as soon as possible this morning. I feel that I have committed a grave injustice. Inasmuch as I let myself be led or rushed for lack of

* A fair reading of the transcript reflects that this "so-called" verdict against Easton, reported separately from the verdict against Hockridge and Petri, was an afterthought.

a better word into agreeing with the
verdict of the jury . . . " (A. 65)
(emphasis added)

The Court determined to interview Jurors #3 and #4, rather than set aside the partial verdict, to "see [if he could find] any way of salvaging this thing" (A. 66).^{*} Concerning the interview, the Court stated:

"I am not going to let it [the Count One verdict] stand if I am satisfied that this lady as she says it was pressured into doing it." (A. 68)

The Court then interviewed the two jurors in chambers. Counsel were not present. The jurors indicated that their comments were directed to the conspiracy verdict rendered against Hockridge, Petri and Easton (A. 73).

At first, Juror #3 indicated that her comments were with respect to all three defendants (A. 73). With respect to Hockridge and Petri she indicated she felt the evidence insufficient (A. 73-74). As she began to speak about Easton, the Court stopped her from continuing and turned his inquiry to Juror #4. Juror #4 indicated that during the deliberations she "was personally attacked incredibly by two members [of the

* Again, later he stated: "I hope that in some way that [the interview] might salvage the situation." (A. 68)

jury]" (A. 74). The Court refused to permit her to describe the nature of the attack (A. 75).

Juror #4 indicated that ultimately she became secure in the guilty verdict respecting Hockridge and Petri (A. 75). However, as to Easton, she indicated that she, and several other jurors, were:

"Railroaded, you know, before we could bring up our doubts . . . I know that at the time when we were polled that I should have said no." (A. 75-76) *

The Court then turned to Juror #3 and stated to her:

"[Y]ou have had sort of an emotional problem with this thing here, haven't you?"

"JUROR NO. 3: It can be an emotional problem but the question in my mind is the reasonable doubt . . . [instruction as to reasonable doubt omitted]

"THE COURT: I think what I would like to do is this. You know, I mentioned to you when I charged you I don't want you ever to surrender your honest convictions because of other jurors.

"JUROR NC. 3: That is what I did.

"THE COURT: You think you did."
(A. 76) (Emphasis added)

The Court's colloquy was plainly intimidating to the Jurors who candidly expressed their concern over the "kangaroo"

* In fact, she had no opportunity to do so, since the poll was not conducted individually as to each defendant (T. 5945).

jury -- a situation which had existed as early as the fifth trial day. The Judge, rather than dealing directly with the strong arm tactics of some of the jurors, left the situation unresolved. It became more important to "salvage" the trial than to obtain justice. He said to the two jurors:

"I would like you to think about that [the conspiracy verdict] and resume your deliberations and then we'll see how it goes today with the deliberations and then perhaps after we finish here I will want to see you again.

"JUROR NO. 3: I don't understand what you mean. Continue the deliberating --

"THE COURT: After the jury finishes, I think I will want to see you again and talk again about some of these things that you have told me this morning. But I think it would be wise if both of you could go back with the jurors.

"You have got a problem and you do the same thing with respect to Mr. Easton. Think that one over pretty carefully. . .

"JUROR NO. 4: I know there is one other member too who feels that way too.

"THE COURT: About what?

"JUROR NO. 4: I think about all three actually. But I think specifically about Easton also.

"THE COURT: All right. Why don't you go back then and let's see where we go today and I'll follow this up

"One other thought. When you go back with the jury and when you think it is an appropriate time, you raise your points again with the jury about what you think about what they have done and see what they think about that and have an exchange about that." (A. 78-79) (Emphasis added)

Thereafter, defendants moved for a mistrial (T. 5935). The Court directed the submission of briefs by counsel. As discussed later, Easton's motion was never formally decided prior to entry of judgment (A. 1-3).

At no time following his meeting with Jurors #3 and #4 did the Judge charge the jury as a whole to deliberate anew as to Easton, as he had instructed Jurors #3 and #4 to do. In fact, the jury was never instructed as to the substance of the Court's private interview.

At 2:30 p.m. of the day of the Judge's interview with the two jurors, the jury rendered its verdict on Count One with respect to Flynn, finding him not guilty (T. 5955). Further requests for evidence and testimony relating to Easton were made before the jury adjourned for the day (T. 5956-7). At 2:00 p.m. on February 17, after spending much of the morning hearing testimony read, the jury returned a further partial verdict, finding Hockridge, Petri and Easton guilty on Count Two, Flynn not guilty on Count Two, and all defendants not guilty on Counts Three and Four (T. 5968-70).

Thereafter, the jury rendered verdicts on Counts Eight, Ten, Eleven, Twelve, Thirteen, Fourteen, Twenty and Twenty-one; all defendants were found not guilty on all counts, except Petri who was found guilty on Count Eight.

A verdict finding all defendants not guilty on Count Seventeen was thereafter rendered (T. 6021).

After six days of deliberations the jury was discharged (T. 6022-3) and the Court thereafter dismissed the remaining counts (A. 3).

The Judge never met with Jurors #3 and #4 again, as promised. The jury was never instructed to redeliberate as to Easton. The Judge did not repoll the jury as to Count One. The Judge did not permit Jurors #3 and #4 to alter their verdict as to Easton.

Easton was sentenced by the Court on June 15, 1977 (A. 3). Apparently, the Court had determined to deny his motion for a mistrial and to set aside the verdict based upon the interview with Jurors #3 and #4, although no formal decision was rendered (see A. 3).*

3. The Government's Case

During the trial the government proved that certain loans were made by the Chemical Bank and Bank of New York to the borrowing corporations,** and that the loans were unpaid in whole or part. The government attempted to prove in this

* A formal decision was rendered with respect to a similar motion by Hockridge and Petri. The Court wrote that it was "satisfied that neither of the two jurors surrendered their honest convictions". (Decision dated April 12, 1977).

** See GX81-81C contained in the Exhibit Volume submitted simultaneously herewith to the Court.

connection that the loans were induced by the filing of false financial statements with respect to these corporations (A. 4 et seq.). The essence of the government's case against Easton was that he, although a low salaried part-time employee, was in charge of "creating" the financial statements (T. 25) that were submitted to the banks in order to induce loans and had knowledge of their falsity.

This line was pursued notwithstanding that Easton was but a part-time employee of the Petri companies receiving a salary far less than numerous other members of the companies' staff, and had little independent responsibility (see Point 4, below).

The evidence of Easton's authorship, even as adduced by the government, was scant. Norman Henderson, a vice-president of Chemical in the "loan work-out department", identified during his testimony certain financial statements which were to be found in that bank's loan files relating to the borrowing corporations. All but two were unsigned. None was signed by Easton and all were unaudited (T. 616).*

With respect to the financial statements, Henderson conceded that they were not bank records, nor records made by

* The financial statements in question are bound in the Exhibit Volume, separately submitted to the Court.

any bank employee (T. 462-3). Since he was uninvolved with the granting of the loans, he testified he had no knowledge of reliance thereon (T. 463-4). He further conceded he had no knowledge of who prepared the statements (T. 466-7). The Court admitted the statements "subject to connection" (e.g., T. 137-9) over objection (id., T. 191). Easton's counsel thereafter moved to strike all such evidence as not having been authenticated (T. 740-1) and as inadmissible hearsay (T. 740-1). The government argued that (a) the fact that the statements were maintained by the bank in the ordinary course of its business sufficed (T. 742-3), and (b) that in any event, the statements were not offered for the truth of their contents, but for the falsity thereof (T. 744, 746). The motion was denied (T. 745). The motion was renewed at the close of the government's case (T. 3365) and again overruled (T. 3368). At no time prior to the charge did the Court instruct the jury as to the meaning of his reception of evidence subject to connection.*

The government also offered the testimony of other Petri company employees in an attempt to bolster its argument. George Kennedy, an accountant with substantial experience and a bookkeeper (T. 680-3), testified that he took instructions from Easton (T. 647), but conceded that his instructions were

* As noted above, the jury made repeated requests for this evidence during its deliberations.

to set up proper records for the corporations (T. 806), and that Easton never asked him to alter any financial records (T. 807). Kennedy also conceded that he had prepared financial statements himself (T. 785, 786, 851).

Marvin Burke, a financial consultant (T. 997) who was paid \$500 per week (T. 1008), could testify only concerning one financial statement, prepared initially by Easton and altered by Burke and Easton in one respect at Petri's direction (T. 1023-4). Burke specifically stated that in all other respects the statement was accurate (T. 1027). The statement was signed not by Easton, but Burke (GX11F, see Exhibit Volume). Significantly, Burke, like the government's other principal witnesses against Easton, had been promised immunity by the government.

The government produced Robert Fillet as the principal witness against Easton. Fillet had been promised immunity (T. 1653-5); cross-examination revealed that Chemical Bank had assumed certain financial obligations of Fillet (T. 1698-9) and that Fillet had an extensive history, prior to affiliating with Petri and Flynn, of unpaid business loans and defunct controlled corporations (T. 1776-7, 1783).

Fillet testified that he was retained by Flynn and Petri as a financial consultant (T. 1562-3), and paid (or promised) \$1,200 per week (or in excess of three times Easton's salary) as compensation (T. 1565). Fillet was responsible for hiring Easton, who at the time was employed part-time by a com-

pany which Petri and Flynn had acquired, to work for certain companies; Easton was offered a "modest salary" (T. 1587).

The substance of Fillet's testimony was that Easton, in his presence, advised Petri that he had made certain requested changes to a financial statement (T. 1603). Fillet also testified to a conversation he had with Easton, shortly before Fillet resigned his position, in which Easton revealed knowledge of the extent of the outstanding loans of the borrowing corporations (T. 1637).

Fillet's steadfast, and obviously self-interested, denials of having prepared the financial statements, or overseen the finances of the Petri companies, were proven incredible under cross-examination (e.g., T. 1836-61). Inter alia, Fillet had advised the Grand Jury that it was Petri who altered financial statements, at Hockridge's request (T. 1561).

John Otis, an officer of the Bank of New York, testified concerning Easton's activities in connection with obtaining a loan for Today Stores Services from the bank, which activities included handing over to Otis a financial statement (T. 3146).^{*} He also testified that Easton advised him the statements had been prepared by Petri (T. 3169-70).

* Easton was found not guilty on all counts relating to submission of false financial statements, except, of course, those counts which were dismissed by the Court.

Two secretarial employees of the Petri companies testified to having typed financial data, on occasion, given to them, by Easton, among others (T. 875, 2500-1). One of those secretaries was able only to state that she might have received data for financial statements from Easton (T. 2500-1). The only secretary who was certain she had typed financial data for Easton was unable to conclude that she had typed the specific statements transmitted to Chemical (T. 903) or to identify many of the statements in evidence as her work-product (T. 918).

The evidence that Easton occupied a position of managerial responsibility for Petri's companies was, if anything, more meager. No less than seven witnesses employed by one or more of the companies listed only Petri and Flynn as their "bosses" (Burke, T. 1205; Lodge, T. 1316; Williams, T. 1384, 1385; Gelertner, T. 1485-6; Fernandez, T. 1437; Zavala, T. 2126-7, 2122-3; Whitney, T. 3113-5, 3044, 3058).

Petri, not Easton, was identified as the individual negotiating loans with Hockridge at Chemical Bank (T. 1208). Petri was also identified as Easton's "boss" (T. 1302). Employee-witnesses repeatedly stated that Easton's authority was limited (T. 1325). One secretary told an FBI investigator that Easton "didn't seem to know what was going on. He was more like a bookkeeper" (T. 1325). Witnesses repeatedly stated that Easton often complained of his lack of knowledge of the

companies' dealings (T. 1329, 1237). Indeed, even as to those companies in which Petri had assigned Easton an officer-ship, Easton's day-to-day involvement was virtually non-existent (e.g., T. 1485-6). Easton was described by his co-workers as Petri's "pawn" (T. 1538) and "naive" (T. 2657).

Even George Whitney, an indicted co-conspirator who had pleaded guilty on Count One and was awaiting sentencing at the time he testified, stated to the FBI that Easton lacked managerial responsibility (T. 3132; see also, T. 2122-3).*

Eastons' salary was commensurate with his position as an inferior. Petri's chauffeur earned more than he (T. 1389), as did Burke, Fillet and other principals.

4. The Government's Presentation Of Irrelevant And Prejudicial Matter.

As if in recognition of the paucity of competent evidence proving Easton's involvement, the government sought to introduce irrelevant and prejudicial matter concerning Easton.

* Whitney could testify concerning Easton only that Easton was present at a meeting during which Fillet's threat to "turn in" the corporations if his demands for additional remuneration were not met was discussed although Easton was silent (e.g., T. 2923).

The government repeatedly elicited testimony, over objection, that Easton permitted other employees to receive salary payments without withholding taxes, although no such crime was charged in the indictment (see, e.g., 642, 839, 1008, 2183). The Court permitted such testimony, without explanation (id.).

Similarly, during the cross-examination of Easton, the government questioned Easton extensively concerning his personal finances and particularly as to the fact that Easton's net worth had increased from approximately \$170,000 in 1972 to approximately \$3 million in 1974 -- two years after the period covered in the indictment (T. 5033-4).

The Assistant United States Attorney also repeatedly charged in his summation that during the relevant period Easton was "lacing his pockets with cash" (T. 5416), an allegation he supported with reference to Easton's increased net worth in 1974 (T. 5428-9), an increase in fact traceable to Easton's private business ventures after resigning from the Petri companies (T. 5109-5114). This area is discussed at Points V and VI of the legal argument below.

5. The Testimony Of
Easton And His Witnesses

Easton, who was 41 years of age at the time of trial, took the stand in his own defense, as did twelve character wit-

nesses in his behalf. Each of the character witnesses had dealt with Easton in business and professional matters and many had referred clients to him. Sidney Pollack, a prominent businessman, additionally testified that his factoring company had made loans aggregating approximately \$1 million to Easton or companies in which Easton had an interest, all of which were timely repaid (T. 4763-4).

Similarly, Easton testified that all of his substantial personal and unrelated business loans in 1971 and 1972 has been timely repaid (T. 4582-4, 4515-6; 4537-8). This was supported by other testimony (e.g., T. 479, 482-6).

Easton testified that he was only a part-time employee of the Petri companies (T. 4598), because involved at the time in outside business ventures as well. He reported to Fillet (T. 4599). Easton denied preparing any of the relevant financial statements (A. 29, et seq.). He conceded preparing, at Fillet's and Petri's request, certain pro forma statements and projections (T. 4611), which, in each instance, he turned over to Fillet or Petri (T. 4615). In each instance, the figures were based upon data given to him by Fillet or Petri (T. 4615), not upon an examination of the relevant corporate records (id.). In each instance the statements were labelled as either "pro forma financial statements" or projections (T. 4616).

In his testimony Easton also described the manner in which the format of the relevant financial statements which had apparently been received by Chemical differed from those statements he had prepared (T. 4622) (compare, e.g., GX2F-1 and GX2F-2, which Easton prepared, with the remaining financial statements in the Exhibit Volume. See also, T. 4577-8, T. 4622-5).

Hockridge, who also took the stand, confirmed the evidence of Easton's non-involvement, testifying that he received all relevant financial data from Petri (T. 3543).

Although there had been testimony that Hockridge joined certain defendants on trips outside New York City, Hockridge also testified that Easton was not present on any such trips (T. 3865-6).

6. Events Following Conclusion Of The Testimony.

At the close of the trial, and in an effort to shore up the obviously shaky case against Easton, the Assistant United States Attorney devoted virtually his entire summation to Easton. Of the one hundred thirty-five pages spent discussing the individual defendants, one hundred pages were focused upon Easton (T. 5345-5441, 5304-6, 5316-9, 5333-4), and only thirty-five in the aggregate upon the other three defendants (T. 5322, 5472, 5320-22, 5465-73, 5441-65).

The Court's charge to the jury included a general direction that the jury could consider evidence admitted subject to connection only if it found the government had proven a conspiracy (T. 5818-19). The jury was not given reference to the specific and numerous exhibits so admitted. Nor was the jury instructed that it must find the existence of such a conspiracy based only upon non-hearsay evidence (id.). A modified Pinkerton charge was also given (T. 5836), to which objection was raised (T. 5852).

As noted above, the charge was concluded mid-day on February 11, 1977 (T. 5860). The jury adjourned that day, a Friday, without reaching any verdict. At 6:30 p.m. on Monday, February 14, 1977 the Court, over objection received the jury's partial verdict as to Hockridge, Petri and Easton on Count One (T. 5961-2) and the jury was polled, but not separately as to each defendant (id.).

Early the following day, Juror #4 sent her note to Judge Bonsal, a fact revealed late in the day (A. 57). No further verdict was revealed that day. The next day, the Court received Juror #3's note and held its interview with the two jurors (A. 73, et seq.)

Shortly after the interview, and in the absence of any instructions to the jury as a whole to redeliberate as to Easton's guilt on Count One, the jury rendered its verdict as to Flynn (T. 5955). The next day, at 2:00 p.m., after

spending much of the morning hearing testimony re-read, the jury rendered its further partial verdict finding Hockridge, Petri and Easton guilty on Count Two, Flynn not guilty on that Count and all defendants not guilty on Counts Three and Four (T. 5968-70).

Thereafter, verdicts were returned on Counts Eight, Ten, Eleven, Twelve, Thirteen, Fourteen, Seventeen, Twenty and Twenty-One. Easton was found not guilty on each Count (T. 6021).

The jury was discharged and the remaining counts of the indictment dismissed (T. 6022-3; A.3). The jury was never instructed to redeliberate as to Easton's guilt on Count One. The Court never met with Jurors #3 and #4 again. The two jurors were not permitted to alter their verdict.

Easton was thereafter sentenced, although his motion to set aside the verdict was never formally decided.

Easton appeals from the judgment of conviction on Counts One and Two.

LEGAL ARGUMENT

POINT I.

THE COURT'S PRIVATE INTERVIEW WITH AND INSTRUCTION OF JURORS #3 AND #4, CONSTITUTES REVER- SIBLE ERROR.

In United States v. Gullia, 450 F.2d 777 (3d Cir. 1971), one appellant had been tried for eleven counts and the other appellant for one count of aiding and abetting a bank teller in embezzling funds from her employer and with obstruction of the FBI investigation thereof. The trial lasted from September 30 to October 16, 1969. On Friday, October 16, deliberations were commenced. The judge, who was required to be out-of-town, left instructions that any verdict reached be sealed. The jury returned a sealed verdict at 7:35 p.m. When Court reconvened the following Monday, and during the reading of the verdict, one juror interrupted and asked to speak with the judge. The judge consulted counsel. Both appellants' counsel approved of the Court's intention to interview the juror.

All counsel were present during the interview. The reviewing court summarized the transcript of the interview as follows:

"[T]he juror had agreed to the sealed verdict with some reluctance; the juror, in the interim, had discussed the case and the verdict with her husband; the juror had some religious scruples about sitting in judgment upon another; the juror had been unable to sleep since the verdict was sealed . . .; the trial judge correctly instructed

the juror, again and again, during the conference upon the meaning of 'aids, abets, counsels, commands, induces or procures'; . . . in response to the juror's question '. . . [w]hat would happen, Judge, if I held out?', the trial Judge answered: '. . . [i]t would mean that we have just wasted two weeks, that is all.' Upon objection . . . his revised reply was 'It would just be a misemployment of time.'" Id., at 778-9.

Thereafter, in open Court the Judge repeated his instructions (a) as to aiding and abetting, (b) that the verdict must be unanimous, and (c) that one juror need not be guided by the majority. The jury then withdrew to deliberate further. Guilty verdicts as to all counts and both defendants were thereafter rendered.

The Circuit Court reversed and remanded, holding that the trial judge erred in privately interviewing the juror and that:

"[I]t was not only irregular, but error to give additional instructions to the extent and of the type here given to one juror in the absence of the remaining jurors." Id. at 779.

The Court's comment concerning the consequences of a jury deadlock was also found to be in error.

In United States v. Rabb, 450 F.2d 343 (3d. Cir. 1971), cert. denied, 405 U.S. 995 (1972), and Beaty v. United States, 213 F.2d 712, 722 (4th Cir. 1954), vacated and remanded on other grounds, 348 U.S. 905 (1955), the respective Circuit

Courts also wrote that it was improper for the Court to communicate with any individual juror.*

It is manifest under this authority, that the interview conducted at bar was also improper and prejudicial to Easton and that under Gullia, reversal is mandated. Further, as discussed below, the private conference in effect operated as an Allen charge to the jurors, improperly coercing them to render a verdict as to Count Two. Additionally, as discussed below, the jurors were told they would receive an opportunity to redeliberate with respect to Easton on Count One, but in fact were denied that opportunity. Finally, the Court, by denying the motion for mistrial, allowed jury misconduct to occur, and continue to occur, without sanction, and a non-unanimous verdict to stand.

* In Beaty, the Court found the communication with the foreman not to be prejudicial because solely related to a beneficial recommendation as to sentencing.

United States v. Berger, 433 F.2d 680 (2d Cir. 1970) cert. denied, 401 U.S. 962 (1971) and United States v. Zeehandelaar, 498 F.2d 352 (2d Cir. 1974) are distinguishable. In Berger, the Court merely mentioned a juror, who was to have been her conduct in leaving the hotel and reinstructed her on point. In Zeehandelaar, the Court merely discussed three jurors' discontent with the deliberations schedule set by the Court.

POINT II

THE SUPPLEMENTAL INSTRUCTIONS
WERE TANTAMOUNT TO AN ALLEN
CHARGE: AS SUCH THE COUNT TWO
CONVICTION MUST BE REVERSED
AS A PRODUCT OF COERCION

During his colloquy with Jurors #3 and #4, the Trial Judge, in his effort to "salvage" the verdict, at first sought to minimize the jurors' statements. When Juror #4 commented that three or four jurors had been railroaded into a verdict as to Easton (A. 75), the Court abruptly turned to Juror #3, indicating that her statements evinced "an emotional problem" (A. 76). When Juror #3 indicated that she had surrendered her honest conviction of Easton's innocence, the Court commented "You think you did." (A. 76).

Thereafter, the Court indicated to the jurors that they should go back to the jury and at some point redeliberate as to Easton (A. 79). However, no such instruction was given to the jury as a whole. We, of course, cannot know whether such redeliberation occurred, as the jury was never again polled on Count One as to Easton.

The impact of the two juror interview upon the ten excluded jurors must have been akin to that of an Allen charge.*

* The remaining jurors assuredly were aware that Jurors #3 and #4 had met with Judge Bonsal, as the interview occurred after the jury was assembled on the morning of February 16, 1976 (A. 65).

The Court's direction to Jurors #3 and #4 that they continue deliberating, coupled with the Court's failure to charge the jury at large either to reopen consideration of Count One as to Easton or to give a proper deference and regard to their fellow jurors' opinions* and coupled with the Court's attitude that the statements of Jurors #3 and #4 were not serious or unusual and required no immediate action, may also be likened in coercive effect to an improperly given Allen charge. The composite was so coercive as to vitiate the subsequent conviction on Count Two, which followed soon after the interview.

This Circuit, as virtually all of the Circuits, has repeatedly directed the exercise of extreme caution in giving Allen-type charges. For example, in United States v. Robinson, 544 F.2d 611 (2d Cir. 1976), two Allen charges were given, the first after the Court was advised of the jury's 11-1 division, the second after the Court received a note from the dissenter concerning her "strong reasonable doubt". The Court noted that when the judge is aware of the numerical split of the jury, and the jury is aware of the Court's knowledge, the giving of an Allen charge is a "precarious undertaking" because the effect is "unavoidably to add the judge's influence to the side of the majority" Id. at 620, n. 14.

* This, of course, the element of a proper Allen charge.

At v, the Court was also aware of the numerical division, must assume by reason of the circumstances that the jury was also aware of the Judge's knowledge thereof. Given these facts, the returning of Juror #3 and #4 to the jury room, without the giving of any instruction to the jury as a whole and with the instruction to Jurors #3 and #4 that they resume deliberations is, if anything, more coercive than the rendering of an evenly balanced, supplementary instruction to all jurors. See United States v. Green, 523 F.2d 229 (2d Cir. 1975), cert. denied, 423 U.S. 1074 (1976).

In United States v. Kenner, 354 F.2d 780 (2d Cir. 1965), cert. denied, 383 U.S. 958 (1966), this Circuit affirmed the giving of an Allen charge by only the "barest margin", by reason of the Court's numerous disclaimers of an intention to coerce a verdict.

In United States v. Bailey, 468 F.2d 652 (5th Cir. 1972) reh. en banc, 480 F.2d 518 (5th Cir. 1973), the Court affirmed where an Allen charge was utilized, but indicated in its lengthy opinion that it based its ruling solely upon the basis of stare decisis, finding the charge inherently coercive.*

* The Court wrote:

"We deeply regret being compelled to affirm this conviction. We do so only because we are bound by precedent. [citations omitted] Were the choice ours alone to make, we would put an end to the Allen charge in a 'quick and not too decent burial'" Id., at 669.

In United States v. Thomas, 449 F.2d 1177 (D.C. Cir. 1971) the Court wrote:

"Every defendant in a federal criminal case has the right to have his guilt found if found at all, only by the unanimous verdict of a jury of his peers. Any undue intrusion by the trial judge into this exclusive province of the jury is error of the first magnitude. When efforts to secure a verdict from the jury reach the point that a single juror may be coerced into surrendering views conscientiously entertained, the jury's province is invaded and the requirement of unanimity is diluted" Id., at 1181 (footnotes omitted).

Further, the Court wrote:

"Communications from judge to jury are unduly constraining whenever they possess a substantial propensity for prying individual jurors loose from beliefs they honestly have . . . Equally pressuring are statements susceptible to an interpretation reflecting unwholesomely upon minority jurors simple because they happen to be in the minority. 'No juror should be induced to agree to a verdict by a fear that a failure so to agree will be regarded by the public as reflecting upon either his intelligence, or his integrity' Id., at 1182-3 (footnotes omitted).*

In Thomas, the Court reversed and remanded. The Circuit also, later in the opinion, abandoned prospectively the use of the

* Of course, Jurors #3 and #4 had already stated that such fear was the basis of their earlier verdict. The Judge's comments concerning Juror #3's "emotional problem" under the circumstances could only further undercut her resolve to abide by her minority view.

Allen charge (id., at 1187). See also, United States v. Brown, 411 F.2d 930 (7th Cir. 1969), cert. denied, 396 U.S. 1017 (1970), and United States v. Fioravanti, 412 F.2d 407 (3d Cir. 1969), cert. denied, 396 U.S. 837 (1969), in which the Seventh and Third Circuits similarly disapproved the use of the charge.

In light of the coercive impact of the events surrounding the Court's private interview and of the brief time elapsed in deliberations prior to return of the verdict as to Count Two, it is manifest that the judgment must be reversed.*

* It is also important to note that the Court's charge included a modified Pinkerton instruction. At the time when the jurors deliberated on Count Two, the conspiracy verdict had not been set aside. Jurors #3 and #4 were under instructions to continue to deliberate. It is quite possible that, in deliberating, the jury applied the Pinkerton charge to find Easton guilty on Count Two. In view of the fact that the Count One conviction was not unanimous (see Point III), any such result would be improper. The Count Two conviction must be reversed for this reason as well.

POINT III

REVERSAL IS MANDATED BY THE EVIDENCE OF JUROR MISCONDUCT AND THE EVIDENCE EASTON WAS DENIED HIS RIGHT TO A UNANIMOUS VERDICT.

A. Sufficient And Competent Evidence Of Misconduct And Lack of Unanimity Appears In The Record

In ruling upon Petri's and Hockridge's motions for a mistrial, the Court did not rule in the question of juror misconduct. Rather the Judge indicated only that he did not find that Jurors #3 and #4 had surrendered their honest convictions, although Juror #3 expressly stated that this is what she had done as to Easton (A. 78-79). Competent evidence of juror misconduct and lack of unanimity was presented below and mandates reversal.

1. The Voluntary Statements Of The Two Jurors, Made Before Discharge Of The Jury, Constitute Competent Evidence.

Rule 606(b) of the Federal Rules of Evidence (hereinafter "F.R.E. 606(b)") provides in pertinent part:

"Inquiry into validity of verdict or indictment. Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith . . . "

As discussed below, by its terms F.R.E. 606(b) is inapplicable at bar. Easton did not below, and does not now, request a hearing at which juror testimony would be received as to the rendering of the verdict. Nor does nor did Easton seek to offer a juror affidavit (See F.R.E. 606(b)). Rather Easton now, and below, relies upon the existing record.

A review of the policy basis of Rule 606(b) supports this view. The rule, which codified existing law, Government of Virgin Islands v. Gereau, 523 F.2d 140 (3d Cir. 1975), cert. denied, 424 U.S. 917 (1976), is intended to promote finality of decision, to protect jurors from post-discharge harassment by disappointed litigants or their agents, and to minimize the risk of post-verdict jury-tampering. See comments of Congressman Wiggins, 120 Cong. Rec. 2374 (1974). See also, McDonald v. Pless, 238 U.S. 264 (1915); Government of Virgin Islands v. Gereau, 523 F.2d 140 (3d Cir. 1975), cert. denied, 424 U.S. 917 (1976).*

* We suggest that there is another policy which should be considered, although no case has been found articulating such policy. Jurors, particularly where as at bar they have devoted over thirty days to consideration of a complex litigation to the undoubted detriment of their work and home lives, should be permitting to feel, after the conclusion to the trial that judgment ensued reflects their honest and a just view. Permitting pre-discharge impeachment of course, would serve this good. See below.

Before the enactment of F.R.E. 606(b), the Supreme Court cautioned that an ironclad rule prohibiting all juror impeachment could not be safely laid down, writing:

"But cases might arise in which it would be impossible to refuse them [evidence from jurors impeaching a verdict] without violating the plainest principles of justice." United States v. Reid, 12 How. 361 at 366 (1851)

See also, McDonald v. Pless, 238 U.S. 264 (1915); cf., Note, "Constitutional Law: Rule Prohibiting Impeachment of Verdicts By Jurors As Deprivation of Due Process", 14 Okla. L. Rev. 533 (1961), indicating that under some circumstances the no-impeachment rule may deny the litigant due process.

The policy embodied in F.R.E. 606(b) is not disturbed at bar. A central basis of Rule 606 is to protect jurors from post-verdict harassment by litigants or their agents. See, McDonald v. Pless, supra; Miller v. United States, 403 F.2d 77 (2d Cir. 1968); United States v. Green, 523 F.2d 229 (2d Cir. 1975), cert. denied, 423 U.S. 1074 (1976).

This undeniable interest was not violated at bar. No post-verdict interview of any juror was sought or conducted by the litigants. The basis of the motion below was the existing record, consisting of juror statements voluntarily made to the Court before the jury was discharged. Permitting impeachment of the verdict under the circumstances at bar would not therefore incur a risk of post-discharge jury tampering or harassment.

Similarly, the goal of finality is not undercut by reception of the evidence of Jurors #3 and #4 at bar. The cases and commentary repeatedly indicate that the no-impeachment rule relates to evidence obtained after the jury is discharged. For example, in United States v. Chereton, 309 F.2d 197, 200 (6th Cir. 1962), cert. denied, 372 U.S. 936 (1963), the Court wrote:

"Where jurors in their jury room and in open court gave their unanimous assent to a verdict which was accepted by the court and the jury discharged, it is too late thereafter for individual jurors to change their minds and claim that they were mistaken or unwilling in the assent which they gave." (emphasis added, citation omitted)

Accord, United States v. Schroeder, 433 F.2d 846, 851 (8th Cir. 1971), cert. denied, 400 U.S. 1024 (1971); Cherensky v. George Washington - East Motor Lodge, 317 F.Supp. 1401 (E.D.Pa. 1970).^{*} Thus, Professor Moore states:

"[P]rior to the jury's discharge there is nothing in the policy underlying the no-impeachment rule, presently considered, to preclude a juror from testifying relative to misconduct or other matters that might vitiate the verdict." 6A Moore's Federal Practice ¶ 59.08[4], at 59-143

* In Cherensky, the Court also noted that the rule of no-impeachment applied there because the matter was not criminal and because the juror had ample opportunity timely to advise the Court of the jury misconduct but did not.

Similarly, the Honorable Jack B. Weinstein states:

"The reasons for [Rule 606(b)] . . . disappear in large part if such investigation as may be desired is made by the judge and takes place before the juror's discharge and separation." ³ Weinstein's Evidence § 606[04] (emphasis in original)

See also, American Bar Association Project on Minimum Standards For Criminal Justice, Standards Relating To: Trial By Jury (Approved Draft, 1968), Commentary to §5.7, at 137 ("Finally, it should be emphasized that the restrictions in Section 5.7(a) apply to inquiry after the jury has been discharged . . . ").

The no-impeachment rule therefore does not apply to pre-discharge statements by jurors.

Moreover, where jury bias has already been manifested prior to deliberations, there is particular reason to admit and consider pre-discharge record evidence of further misconduct. Thus, Judge Weinstein has written:

"Where the comments indicate that the juror had preconceived notions of liability or guilt . . . the statements may be admissible . . . as tending to prove that the juror lied on the voir dire, a separate question from that of impeachment of verdicts."
³ Weinstein's Evidence, § 606[04] at 606-35 (footnote omitted)

See, Clark v. United States, 289 U.S. 1 (1933).

At bar, of course, evidence was placed before the Court on the fifth day of trial that numerous jurors entertained pre-conceived notions of the defendants' guilt. This, in itself,

constituted grounds for declaration of a mistrial. Cf., Clark, supra; See, Irvin v. Dowd, 366 U.S. 717 (1961).^{*} Such prior misconduct also furnishes added reason for admitting evidence of subsequent misconduct.

Finally, where the evidence is offered, inter alia, to prove that no unanimous verdict was rendered, it has repeatedly been held admissible. Fox v. United States, 417 F.2d 84 (5th Cir. 1969); cf., Grace Lines, Inc. v. Motley, 439 F.2d 1028 (2d Cir. 1971), discussed infra.

This Court's decision in Jorgensen v. York Ice Machinery Corporation, 160 F.2d 432 (2d Cir. 1947), supports admission of the evidence at bar. In Jorgensen, although the Court declined to set aside the civil verdict where there was evidence the verdict was achieved by compromise, the Court accepted as evidence the post-discharge juror affidavits, noting that:

* In Irvin, eight of the jurors thought petitioner was guilty, although stating at voir dire that they could lay this preconception aside. Nonetheless, a new trial was ordered, the Court writing:

"With such an opinion permeating their minds, it would be difficult to say that each could exclude this preconception of guilt from his deliberations. The influence that lurks in an opinion once formed is so persistent that it unconsciously fights detachment from the mental processes of the average man." Id., at 727.

"[J]udges again and again repeat the consecrated rubric [the no-impeachment rule] which has so confused the subject; it offers an easy escape from embarrassing choices." Id., at 435.

2. There Was Sufficient
Evidence Of Misconduct
And Lack Of Unanimity
At Bar.

The decision of this Court in Grace Lines, Inc. v. Motley, 439 F.2d 1028 (2d Cir. 1971), demonstrates the necessity for reversal at bar. In that civil action, during the polling of the jury, Juror #11 replied to the clerk's question whether the verdict was hers: "Yes, it had to be unanimous" (Id., at 1030). The Court promptly declared a mistrial. In reversing, this Court stated that:

"Her [Juror #11's] explanation makes it clear that during the jury's deliberation she had taken a contrary view but had won no one over to her position and in the interests of achieving a verdict she had made the vote of the jurors unanimous for the defendant. There was no hint of coercion or improper conduct on her part or on the part of any other member of the jury . . . " Id., at 1031.*

In inquiring whether the juror's motivation was unlawful the Court wrote:

* The Court did not question in Grace Lines the competence of the evidence of the juror's statements.

"While it may be argued that Juror No. 11's explanation implied a disagreement with the verdict, there is not sufficient [sic] in the record to warrant this conclusion There is nothing to indicate that she was surrendering a conscientious conviction." Id., at 1032.

By necessary implication, under Grace Lines, where there is evidence that the juror, or here several jurors, in fact surrendered their honest convictions, a mistrial must be declared. Indeed, the Trial Judge at bar so indicated when he stated prior to the interview with the jurors:

"I am not going to let it [the verdict] stand if I am satisfied that this lady as she says it was pressured into doing it. Don't worry about that." (A. 68)

In United States v. Pleva, 66 F.2d 529 (2d Cir. 1933), the jury had deliberated for approximately one and one-half days when an elderly juror stated in open court that he was ill and additionally that he doubted that a conspiracy had been proven. The Court retained a doctor to examine the juror. The doctor found the juror sufficiently healthy to continue deliberations. Another doctor then examined the juror and also found that he could continue to deliberate. Arrangements were made for deliberations to be held under conditions minimizing the juror's pain. Several hours later, a verdict was rendered. After the jury had been polled, the juror indicated that he had assented because he felt unable physically to hold out his dissenting opinion.

In reversing, this Court wrote:

"No person may lawfully be convicted by a jury unless every juror actually agrees that upon the evidence and the law of the case that person is guilty, If a verdict of guilty is returned for any other reason, it is a perversion of the constitutional guaranty to a jury trial." Id., at 532.

The Court found that the juror agreed because "beset with fear of the consequences as to his health" notwithstanding the doctors' assurances to him and to the Court. Reversal was held mandated because the juror was never persuaded "on the merits to come into agreement" (Id., at 533).

At bar, at least two jurors indicated that they never actually agreed that Easton was guilty and that they were never persuaded "on the merits".

This Court's earlier decision in United States v. Grieco, 261 F.2d 414 (2d Cir. 1958), cert. denied, 359 U.S. 907 (1959), also indicates that the abusive conduct of one or more jurors toward fellow jurors may be grounds for setting aside a verdict. There , the Court wrote:

"We do not say that there can be no threats short of violence by one juror against a recalcitrant dissenter that will upset a verdict . . . " Id., at 415.

In Grieco, the conduct was, however, found insufficient. There, however, there was but one juror whose "blustering arrogance" agitated the one dissenter, whose affidavit was offered after

the jury had been discharged. At bar, two jurors came forward and indicated not simply that one other juror had been "arrogant" but rather that the dissenters had been "personally attacked incredibly" (A. 74) by two jurors (A. 74)* and that the dissenters surrendered their honest convictions of Easton's innocence (A. 76).

Professor Moore has stated, in conformity with this Court's ruling in Grace Lines, supra, that where there is evidence the verdict is not unanimous, it must be set aside. 6A Moore's Federal Practice ¶ 59-08[4], at 59-127-8 and cases cited therein. In Kingsport Utilities, Inc. v. Lamson, 257 F.2d 553, 559 (6th Cir. 1958), the Court similarly held that the verdict is invalid where some jurors in deliberating have surrendered their honest convictions. In Fox v. United States, 417 F.2d 84 (5th Cir. 1969), one juror stood mute during the polling. The Court remanded for a new trial on the ground that no unanimous verdict had been reached.**

* Judge Bonsal cut the juror off as she was about to specify the substance of the attack (A. 75). The Court will recall, that Jurors #3 and #4 also indicated that there were other dissenters.

** In Fox, the Court also found that juror affidavits were plainly admissible to prove the absence of unanimity.

This result is inevitable, in view of the non-waivable constitutional mandate requiring unanimity of verdict.

Andres v. United States, 333 U.S. 740 (1948).

As the verdict at bar was not unanimous and was achieved by reason of improper attack upon Jurors #3 and #4, the verdict must be set aside.

B. At The Least, The Jury
Should Have Been Directed To Redeliberate

In Grace Lines, this Circuit held that under the circumstances, and even though there was no evidence the juror surrendered her conscientious conviction, the Court should have sent the jury back for further deliberations, Id., at 1032.

This view is consistent with the holdings in similar cases in which jury disagreement has surfaced during the polling of the jury. In Williams v. United States, 419 F.2d 740 (D.C. Cir. 1969) (en banc) during the polling, one juror indicated confusion. The Circuit Court approved the Trial Judge's action in sending the jury back to redeliberate its verdict.

Accord, United States v. Fox, 488 F.2d 1093 (5th Cir. 1973), cert. denied, 417 U.S. 948 (1974); United States v. Sexton, 456 F.2d 961 (5th Cir. 1972); United States v. Bendicks, 449 F.2d 313 (5th Cir. 1971); Cook v. United States, 379 F.2d 996 (5th Cir. 1967); Bruce v. Chestnut Farms - Chevy Chase Dairy, 126 F.2d 224 (D.C. Cir. 1946); Fed. R. Crim. P. 31(d).

It is submitted that the Court erred in failing to direct redeliberation at bar. Although during its colloquy the Court directed Jurors #3 and #4 to address the question of Easton's guilt de novo, with the jury when the jurors felt reconsideration was appropriate, no instruction to this effect was ever given to the jury and the jury was never polled again as to Easton's guilt on Count One before discharged. We submit that the circumstances at bar are analogous to those in the cases above-cited and that under Grace Lines the jury should have been sent back "under suitable instructions for further deliberating" (Id., at 1032). The jury not having been so instructed and no further poll having been taken, reversal is mandated.

POINT IV

EASTON WAS ALSO DENIED THE
RIGHT TO A PROPER POLL.

As stated in Miranda v. United States, 255 F.2d 9, 17 (1st Cir. 1958):

"The right of defendant to have the jury polled, as thus recognized and established by Rule 31(d) [of the Federal Rules of Criminal Procedure] is of ancient origin and of basic importance."

Denial of the right constitutes reversible error, Miranda, supra, at 18.

Moreover, as stated in United States v. Mathis, 535 F.2d 1303, 1307 (D.C. Cir. 1976):

"Since jury polls are a matter where 'the need for clarity is at its zenith', Williams v. United States, 136 U.S. App. D.C. 157, 419 F.2d 740 (1969) (en banc), the court should shape the form of the poll so as to minimize possible confusion by the jurors."

At bar, the jury was not polled as to each defendant individually on Count One. Under the circumstances indicating that the verdict lacked unanimity, the procedure adopted was improper, as causing juror confusion and precluding statements of dissent as to Easton, and hence constitutes reversible error.

In Mathis, supra, one of the two defendants contended that denial of a separate poll as to each defendant was error. The Court did not there reverse, because it found that "the trial lasted only one day and was relatively uncomplicated. Only four witnesses testified" Id., at 1307. However, the Court did state:

"The form used here -- a single poll for multiple [there, two] defendants -- may entail risks of confusion, especially in complicated cases. If the same verdict is reached for all defendants, there is the possibility that a single poll would fail to uncover situations where the jury convicted all defendants although only persuaded beyond a reasonable doubt of the guilt of some. Where different verdicts are reached as to various defendants, a single poll could hide a juror's confusion . . . " Id., at 1307.

At bar, the partial verdict as to Count One found Hockridge, Petri and Easton all guilty. There can be little question that the poll as taken masked confusion. Not only did Jurors #3 and #4 later reveal their dissent from the verdict as to Easton, but Juror #4 stated:

"I know that at the time when we were polled that I should have said no . . . on Easton." (A. 75-6)

In fact, by reason of the form of the polling, she had no opportunity to do so.

By reason of the denial to Easton of his right to a clear and unequivocal poll, the judgment should be reversed.

POINT V

THE ADMISSION OF EVIDENCE OF
THE UNRELATED, UNCHARGED CRIME
OF FAILING TO WITHHOLD TAXES
WAS PREJUDICIAL ERROR.

Throughout the presentation of the government's case, its witnesses were permitted to testify to Easton's failure to withhold applicable taxes from payroll checks.* No count of the indictment charged such crime [26 U.S.C. § 6671 et seq. (1970)]. The admission of such testimony plainly constitutes reversible error.

In United States v. Modern Reed & Rattan Co., Inc., 159 F.2d 656 (2d Cir. 1947), cert. denied, 331 U.S. 831 (1947), appellants were charged with violation of the Fair Labor Standards Act. The government in its opening advised the jury of appellants' former plea of guilty to an information charging other violations of the Act. The allegation was also contained in the indictment.

Appellants' counsel had raised no objection to the Assistant United States Attorney's statement (Id., at 657-8).**

* The relevant citations to the testimony and objections thereto appear in the Statement of Facts, supra.

** The Court held:

"Nor should we fail to notice a plain error so far reaching because no objection was taken. Wiborg v. United States, 163 U.S. 632 [1896] . . .; United States v. Atkinson, 297 U.S. 159 [1936] . . ." Id., at 658 (unofficial citations omitted).

The Court wrote that evidence of the commission "of a wholly separate and independent crime even though of the same nature is inadmissible" (Id., at 658). The conviction was reversed.

Rule 404(b) of the Federal Rules of Evidence restates both the general prohibition and certain limited exceptions thereto, stating that evidence of other crimes may "be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident". Where evidence of other crimes is admitted it must:

"[H]ave a real probative value, and not just a possible worth on issues of intent, motive, absence of mistake or accident, or to establish a scheme or plan." Morgan v. United States, 355 F.2d 43, 45 (10th Cir. 1966), cert. denied, 384 U.S. 1025 (1966).

Recognizing that evidence of other crimes "may severely prejudice the defendant" [United States v. Broadway, 477 F.2d 991, 994 (5th Cir. 1973)], the Courts require that such evidence be "plain, clear and conclusive (Id., at 995). Reversal is mandated where the prejudicial effect of the evidence of other crimes outweighs its probative value, where no exception to the exclusionary rule is present, or where simply more evidence of the collateral crime is admitted than is necessary to prove intent, etc., See, e.g., United States v. Ostrowsky, 501 F.2d 318 (7th Cir. 1974).

At bar, the evidence of another crime had no conceivable bearing upon the crimes charged, upon Easton's motive, opportunity, intent, knowledge, identity, or mistake or accident. The evidence must be presumed to be prejudicial, Bradley v. United States, 433 F.2d 1113 (D.C. Cir. 1969), and therefore its admission mandates reversal.

POINT VI

THE ADMISSION OF IRRELEVANT
EVIDENCE CONCERNING EASTON'S
NET WORTH TWO YEARS AFTER THE
CRIMES CHARGED CONSTITUTES
REVERSIBLE ERROR.

During the cross-examination of Easton, evidence was admitted that Easton's net worth in 1974 was approximately \$3 million, although in 1971 and 1972 -- the period covered by the indictment -- his net worth was only approximately \$170,000.* It is submitted that admission of this evidence was highly prejudicial to Easton -- raising an inference that he "laced his pockets with cash" derived from the loans,** at a time when no other evidence whatever of such fact was present and where there was evidence that Easton had engaged in wholly unrelated business ventures.

In United States v. Robinson, 544 F.2d 611 (2d Cir. 1976), appellant contended the Court erred in admitting testimony concerning a .38 caliber handgun found in his possession ten weeks after a robbery in which several guns, including a .38 , were allegedly used. In admitting the evidence, the Court had instructed the jury as to the limited evidentiary

* The relevant record citations appear in the Statement of Facts.

** Such was the allegation of the government in its closing. See Statement of Facts.

value of the testimony. In reversing, the Court noted that the Federal Rules provide for exclusion of relevant testimony the probative value of which is outweighed by the danger of unfair prejudice. The Court found that the probative value of the evidence there was slight, because the jury would have to find that Robinson owned the gun at the time of the robbery, that a .38 was used in the robbery, and that Robinson's gun was the gun in fact used (id., at 616-7). The Appellate Court also found that the possibility of prejudice was substantial, because the jury might conclude that Robinson was dangerous, or possessed the gun for unlawful purposes. The conviction was reversed.

At bar, the evidence of Easton's increased worth two years after the crimes charged (A. 4), had no probative value. The indictment did not charge that Easton had utilized funds obtained by loan for personal ends. Moreover, even if Easton had received and retained such funds, such fact would have been reflected in his 1972 net worth. At best, the jury would have had to assume at bar that Easton received loan funds in 1971 and 1972 and that the receipt was not reflected in the 1971 and 1972 net worth statements admitted into evidence (GX 122F).

By contrast, the prejudicial effect of the evidence was substantial, because lending credence to the government's

claim that Easton "laced his pockets" with loan proceeds.

Given, the tenuous proof of Easton's involvement in the conspiracy, the lack of jury unanimity on point, and the inflammatory nature of the evidence, the admission was clearly erroneous.*

* It is anticipated that appellee will argue that the objection is waived. However, as this Court has held in a similar context, the reviewing Court may note an error of such substance even when no objection was taken. See, United States v. Modern Reed & Rattan Co., Inc., 159 F.2d 656, 658 (2d Cir. 1947), cert. denied, 331 U.S. 831 (1947), and cases cited therein discussed, supra; Johnson v. United States, 318 U.S. 189, 200 (1943).

POINT VII

THE RECEPTION OF THE FINANCIAL STATEMENTS OF THE BORROWING COR- PORATIONS, WITHOUT ANY EVIDENCE OF AUTHENTICATION WAS ALSO ERROR

As noted in the Statement of Facts, numerous financial statements of the borrowing corporations, found in the files of the Chemical Bank, were admitted into evidence "subject to connection" over Easton's objection.* The statements were offered during the testimony of Norman Henderson, a Chemical employee, although Henderson had no knowledge whatever of the authorship of the statements, and although authorship of all but three was never established.** The Court apparently admitted the statements upon the ground that they were made by co-conspirators in furtherance of the conspiracy. However, absent authentication, the statements were inadmissible.

Rule 901 of the Federal Rules of Evidence sets forth the requirement of authentication. The cases have repeatedly emphasized the necessity of proper authentication, United States v. Blake, 488 F.2d 101 (5th Cir. 1973); United States v. Teague, 445 F.2d 114 (7th Cir. 1971); Cahn v. Nicholas, 453 F.2d 528 (5th Cir. 1971).

* The statements appear in the Exhibit Volume submitted simultaneously herewith.

** Easton conceded authoring GX2F-1 and GX2F-2, Burke signed GX11F.

Moreover, absent authentication, the financial writings were also inadmissible as hearsay. Plainly, without proof that the writings were authorized by one of the alleged co-conspirators, under F.R.E. Rule 801, the writings were hearsay. Just as plainly, none of the exceptions to the hearsay rule was met and therefore admission was improper.

The only potential exception was the "business records" exception (F.R.E. Rule 803(6)). However, no proof was adduced that the writings satisfied the exception. It is unquestioned that documents authored by persons not employed by the business whose records are offered do not fall within the rule. United States v. Rosenstein, 474 F.2d 705, 710 (2d Cir. 1973). The fact that the recipient continuously maintained a file containing such matter is immaterial. Id.; accord, Hussein v. Isthmian Lines, Inc., 405 F.2d 946 (5th Cir. 1968). It was conceded by Henderson that no Chemical employee wrote the statements.

Unquestionably, proof of the accuracy, or inaccuracy, of the statements was fundamental to the government's case. Just as plainly, reception of the writings without authentication and given their hearsay quality was an error of substantial magnitude.

CONCLUSION

The judgment of conviction against defendant-appellant Easton on Counts One and Two of the indictment should be reversed and the matter remanded for a new trial, at which trial evidence of Easton's net worth and of the failure to withhold taxes should be excluded and reception of financial statements, except Government Exhibits 2F-1, 2F-2 and 11, from the files of the Chemical Bank denied.

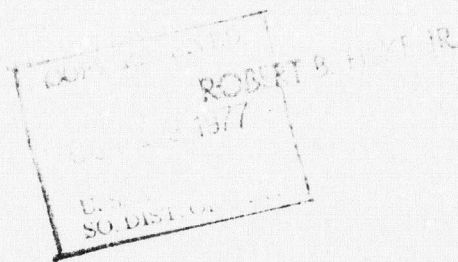
Respectfully submitted,

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